UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

MATRIX EQUITIES, INC.

And **Case 29-CA-168345**

BRIAN BURNS, an individual

Brent E. Childerhose Esq.,
for the General Counsel.
Gerard J. McCreight Esq., counsel for
the Respondent.

Decision

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case on June 7, 2016, in Brooklyn, New York. The charge in this proceeding was filed on January 25, 2016. The complaint that was issued on March 25, alleged that the respondent discharged Brian Burns because he complained about the wages hours and working conditions of the employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following[1]

Findings and Conclusions

I. Jurisdiction

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The alleged unfair labor practice

The employer is an enterprise that is engaged in providing real estate services. It operates in several states including New York, New Jersey, and Connecticut. The company employs about 250 people throughout its various locations. The respondent's headquarters are located in Long Island, New York, where it employs about 25 people who are engaged in executive or administrative functions. Among these functions is a two-person human resources department.

Kathryn Puma is the office manager and head of the two person human resource department. Prior to the hiring of Brian Burns this department consisted or herself and Joe Farruggio. The latter's title was human resource specialist. Because Farruggio was leaving the company in August, an advertisement was placed for the hire of his replacement. In pertinent part, this read as follows: Human Resources Assistant

[1] At times, the transcript lists the Judge as Judge Davis. This is incorrect and should be changed.

We are seeking an ambitious HR professional to assist in the overall operations of the HR department. Standard duties will include but not be limited to; recruiting, employee relations, payroll, benefits and employment law.

* * * *

Preferred Skills and Abilities:

Full cycle recruiting; job descriptions, posting, screening and interviewing
Familiar with employment law and main HR topics
Able to develop and assist in the employee orientation process
Familiar with ADP Workforce or similar payroll systems
Payroll, Time and Attendance, 401K and Custom reports preferred
Entry in payroll/ADP for Direct Deposit, Payroll changes, etc.
Communications oriented: Draft, Revise and Release Memos as needed.
Familiar with FMLA, COBRA & other notices
Familiar with I-9 documents and other HR paperwork
Knowledge of ACA compliance is a major plus

Preferred Education:

Bachelor's, Master, MBA, PHR and SHRM-CP all major pluses

In response, Brian Burns sent in his resume. In his resume, he represented his qualifications, work experience, and educational background in human resources. In part this states:

Qualifications

Well versed in analyzing and executing recruitment strategies, human resource functions, building the internal/external customer experience and leading change management.

Successfully supported and executed the strategic direction of HR, including the implementation of high-value added HR processes that support business goals/objectives.

Proficient in creating a diverse workforce and having a compliance mindset as it correlates to building an all-inclusive working environment.

Expertise in various areas of local, state and federal employment and labor law and effectively applying them to real life practical scenarios.

Demonstrated knowledge and abilities of various computer and HRIS systems

Education

Doctor of Business Administration – Human Resource Management
Walden University – Online.
Anticipated Graduation Date – June 2017…

Master of Science in Human Resource Management – General Human Resource Management
Capella University

Master of Science in Human Resource Management Functional HR Management
Walden University

Bachelor of Science in Business Management and Economics with a concentration in Human Resource Management
SUNY Empire State College

On August 7, 2015, the company offered Burns the position of human resources assistant. His starting salary was $45,000 per year with eligibility for medical, dental, long term disability, and life insurance benefits after the standard probationary period. The offer also provided for a 401K plan after 4 months of employment.

With respect to the hiring of Burns, Kathryn Puma testified that the company, in looking for a replacement for Joe Farruggio, needed someone who would be able to replace his functions. She also testified that a reason she decided to hire Burns was because from his resume and interview, he represented himself as being knowledgeable about compliance issues. That is, she credibly testified that the company was growing pretty fast, and that it needed someone who was familiar with Federal, State, and local laws relating to employment so as to insure that the company would be in compliance with those laws.

Burns began his employment on August 10 and lasted until August 25. At the start of his employment Burns was trained in the company payroll, computer, and other systems by Farruggio who remained on for a few days. It should be noted that because Burns was employed for only 2 weeks, he did not actually get to perform many of the functions for which he was hired. And so in his brief tenure, his ultimate job duties and responsibilities never fully jelled. He did, however, have access to confidential employee files, which were kept under lock and key.

On Wednesday, August 19, during a discussion with Puma about employee background checks, Burns told her that he had been arrested for larceny and had pleaded guilty to a lesser offense. She told him that if she had known that, she wouldn't have hired him.

Over the next several days, Burns, by going into the employee personnel files and reviewing payroll records, accumulated a batch of information that he put together into a document that he emailed to Puma on August 24. When he arrived at work on the 25, Burns met with Puma and she read this document as it was being printed out. At the conclusion of her reading, she told Burns that he was fired.

Before describing this document, I note that Burns did not discuss with any employees any of the issues that are set forth in the document. Burns spoke to no employees and no employees spoke to him about any complaints that they may have had about their wages or working conditions. No employee expressed any interest in forming or joining a union and he had no conversations with any employee about unionization. Indeed, given his conversation with Puma on Wednesday and given Burns' knowledge of employment law, it is obvious to me that the only reason he wrote this letter was to see if he could retain his job by threatening legal

actions against the company; or if that failed to a establish a foundation for a retaliation claim. I don't believe that he was interested in furthering the interests of the other employees.

That said, the memorandum states in pertinent part:

> I have some major concerns about the workplace at Matrix …
>
> The first thing I want to discuss is that Chris Nelson is a self-proclaimed racist. On August 7, he stated that he is a … racist and was proud of it…
>
> The second aspect I am very concerned about is that the company radio plays a plethora and variety of different song/genres throughout the day every day. The radio does not have colorful and expletive language censored…. This is certain not professional for anyone to have to listen to in the workplace.
>
> In New York State, each and every employee regardless of whether they are exempt or nonexempt needs a Notice of Pay form. This form is defined within section 195 of the NYSLL. I have found with spot-checking employee files…. that they do not have this form or perhaps an incomplete form within their folders…
>
> I have also spot checked a lot of NYS employee file folders and have found that they are not receiving the NYS IT-2104 form. This form is the NYS tax form that must be in each employee's folder along with the W-4 form or can be in lieu of the W-4 form, according to the NYS Department of Taxation.
>
> On another note, I do not see anywhere in the workplace the required minimum wage poster, discrimination is unlawful poster, the workers compensation certificate, Article 23-a of the Correction Law of NYS and other required posters both state and federal ones posited conspicuously in the workplace.
>
> Moving on towards payroll related issues, I notice that there are employees … in payroll that do not earn enough to be placed in the exempt level status….
>
> I also noticed that many NYS employees are not punching in and out for the mandatory 30 minute breaks when working a shift of more than 6 hours….
>
> The paid time off policy… is subpar at best. Between the misclassification of employees from exempt and nonexempt, wage disparities and subpar compensatory, medical, dental etc. benefits… I have and will continue to give serious thought in regards to contacting the NLRB and attempting to organize and eventually hope to form a union.
>
> Salaries of some of the workers are below the average demographic salary range for what is required of them and I believe that many employees are classified in the exempt status are more than likely misclassified and should be reclassified in nonexempt status. My position for example, does not rise to the level of an exempt level classification. I merely perform tasks that are given to me, have direct oversight from an hourly manager (Kathryn Puma) and do not have the level of discretion and independent judgment, amongst other requirements that an exempt level position should be. Therefore, I request that I

> am reclassified as a nonexempt level employee. I am requesting back wages with interest and will seek further redress through the courts or the NY Department of Labor accordingly.
>
> On Wednesday August 19, 2015, I presented information to you regarding my background check results from Castlebranch… I came forth to you… and stated that I had a conviction that came up on my background check. When I returned with my background screening results … you looked at my background check and said that, "if I would have known about this before, I would not even have hired you." I stated that I put this information on my employment application and was honest from the beginning. You stated… that my conviction was for a grand larceny and I stated that that was the original arrest charge and that you cannot go by that because it was dropped down to a misdemeanor petit larceny conviction….
>
> In regards to hiring … Christina Whitehurst is clearly age biased and sex biased as well. She stated to me… that she would rather fill Peter's position with a girl than a guy. Her stated reasoning for this is because she and her team will be able to get along with a girl better than a guy.
>
> On August 21, 2015, Ms. Whitehurst spoke to me about the same staff accountant position. She said that she wants someone young, fresh and still "hungry" to fill the upcoming vacancy. I informed her that we needed to pick the most qualified candidate regardless of anything else. She stated that she would rather have a girl fill the vacancy rather than a guy, citing alleged team dynamic issues.
>
> All of these workplace issues are very serious, can have severe repercussions and can be terminally detrimental to the overall stability and integrity of the employees and the company alike. These issues are severe and pervasive enough in some instances to rise to the level of a racially hostile work environment, age biased, sex biased and previous conviction biased workplace. I have been deeply affected by these issues and will not tolerate them anymore. Therefore, due to the severity, frequency and continuity of these egregious violations, I am going to report them to various governmental agencies accordingly. These agencies will include but not be limited to the following: The New York State Department of Labor, the New York State Division of Human Rights, the Equal Employment Opportunity Commission, the New York State Attorney General, the National Labor Relation Board and any other agency that I deem suitable to report these violations to.

With respect to the conversation on August 25, Puma credibly testified that after she read the email, Burns stated that he couldn't work under these conditions and that he was sending all of this information to all of the governmental agencies. Puma testified that she felt betrayed and that she told Burns that he was not a team player and that he needed to go.

Puma's testimony was that she fired Burns not because he raised issues about wages or terms of employment (which was part of his job), but because instead of seeking to discuss and resolve those issues internally as a member of the human resources department, he threatened to initiate (without the consent or support of any other employees), legal proceedings that could potentially cause the company to incur substantial liabilities.

Analysis

It is the General Counsel's theory that by discharging Burns for writing the letter of August 24, the Respondent violated Section 8(a)(1) because it sought to prevent Burns from engaging in some future protected concerted activity. Thus, the General Counsel, relying on *Paraxel International LLC*, 356 NLRB 516 (2001), asserts that it is unlawful for the employer to "pre-emptively" discharge an employee to prevent him from engaging in protected activity. He argues that this is true even in instances where an employee has not yet actually engaged in concerted activity.

I do not agree for the following reasons.

In *Paraxel* the facts were that the charging party, Therese Neuschafer, had engaged in discussions with fellow employees about the relative wage rates given to some but not other employees. She thereupon reported those discussions to her immediate supervisor and suggested that perhaps everyone should quit and come back with a raise. This was reported to management and Neuschafer was called in for a meeting. When satisfied that Neuschafer had not yet stirred up any concern about wages or possible discrimination among other employees, the Respondent discharged her before she could do so.

The facts in Paraxel show that the charging party had engaged in discussion with other employees about their respective wage rates, which would be protected concerted activity for which she could not be discharged. Therefore, under existing law, a discharge of an employee for engaging in that kind of activity would have, by itself, been a violation of the Act. The fact that the Respondent may also have been motivated by a desire to prevent her from continuing to engage in similar concerted activity in the future is simply gilding the lily.

In the present case, Mr. Burns, although reciting a litany of alleged labor violations in his August letter, never had any discussions with any employees about any of these issues. And I don't believe that he ever intended to. Indeed, it is my conclusion that he was interested only in protecting his own job by threatening to initiate a variety of legal actions and that he had no interest in promoting, supporting, or assisting other employees in seeking to address any of those issues. Nor do I believe that he had any intention of trying to convince other employees to join or assist a union.

In addition, although Burns did not work long enough for us to be certain as to what his ultimate functions would have been, it seems to me that both his and the company's intention was that he would be utilized in a professional/managerial position. In this regard, the company's job advertisement was for a person with a professional education in human resources who would be involved, inter alia, in addressing legal issues relating to employment. For his part, Burns represented that he was soon going to obtain a PHD in human resources and that he had "expertise in various areas of local, state and federal employment and labor law and effectively applying them to real life practical scenarios." It is therefore my conclusion that the intention of both parties was that Burns would be utilized to formulate labor relations policies so that the company would be in compliance with the various Federal, State, and local laws that regulate employment relations.

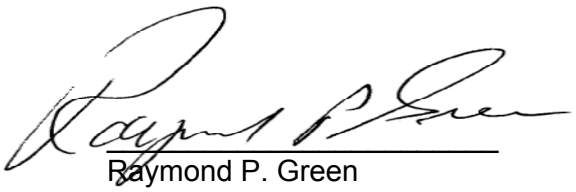
It seems to me that one of the functions of a human resource professional is to help his or her employer avoid (but not evade), potential legal liabilities that can arise in the course of doing business. In my opinion, a person in Burn's position is essentially more aligned with

management and has the job of advising his employer as to how to comply with the law. And if he finds during the course of his employment, that there are practices or procedures that may be contrary to law, his function is to devise, in consultation with his superiors, remedies to redress those situations where potential liabilities may arise. In my opinion, it is not the job of such a person to surprise his employer by first initiating, on his own initiative, legal actions against his own company.

In short, I conclude that because Burns was hired as a human resources professional, his position was aligned with management and he should be construed as a managerial employee. As such, I conclude that he does not enjoy the protection of the Act. See *NLRB v. Bell Aerospace Co., Div. of Textron, Inc*., 416 U.S. 267 (1974). Cf. *Solartec, Inc.,* 352 NLRB 331 (2008), where the Board although finding that the employee was not a managerial employee, nevertheless opined that managerial employees are not protected by the Act. [2]

For the reasons described above, I therefore recommend that the complaint be dismissed.

Dated, Washington, D.C. July 12, 2016



Raymond P. Green
Administrative Law Judge

[2] In *NLRB v. Yeshiva University*, 444 U.S. 672, 687– 688 (1980), the Supreme Court pointed out that the purpose of exempting managerial employees from the Act's protection is to ensure "that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union."